Nos. 117, 118, 119, 332, 333, 334

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

The Denver & Rio Grande Western Railroad Company, Appellant,

v.

Union Pacific Railroad Company, et al.

No. 118

Union Pacific Railroad Company, et al., Appellants,

v.

United States of America, and Interstate Commerce Commission.

No. 119

United States of America, Interstate Commerce Commission, and Secretary of Agriculture, Appellants,

v.

Union Pacific Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

Washington Public Service Commission, et al., Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

No. 333

Union Pacific Railroad Company, et al., Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

No. 334

United States of America and Interstate Commerce Commission, Appellants,

v.

The Denver & Rio Grande Western Railroad Company, et al.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR UNION PACIFIC RAILROAD COMPANY, ET AL., AND WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

CLARENCE S. BECK,
BERT L. OVERCASH,
Counsel of Record for Washington Public Service Commission, et al., Appellants-Appellees,
State Capitol Building,
Lincoln, Nebraska.

ELMER B. COLLINS,
Counsel of Record for Union Pacific R. R. Co., et al., Appellants-Appellees,
1416 Dodge Street,
Omaha, Nebraska.

INDEX

INDEX—Continued

INDEX—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, APPELLANTS,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

No. 332

WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS,

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

No. 333

UNION PACIFIC RAILROAD COMPANY, ET AL.,
APPELLANTS,

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

No. 334

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR UNION PACIFIC RAILROAD COMPANY, ET AL., WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.

Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company (appellees in Nos. 117, 119; appellants in Nos. 118, 333), and Washington Public Service Commission, Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission (appellees in Nos. 117, 119; appellants in Nos. 118, 332), file this joint reply to the brief of the United States of America, the Interstate Commerce Commission and the Secretary of Agriculture (herein called "Government"), and the brief of The Denver & Rio Grande Western Railroad Company (hereinafter called "Rio Grande").

The "Statement" in the Government's brief omits some factual material which we think important, and also contains conclusory statements of fact and law (see pp. 19, 28 and 33).

The Rio Grande's "Statement" is argumentative and conclusory in certain respects and omits factual aspects which are necessary for proper understanding and consideration of the cases.

In the circumstances and to avoid repetition, the Court's attention is respectfully invited to the Statements of the cases in the briefs of these appellants-appellees (see Railroads' briefs, No. 118, pp. 15-30; No. 333, pp. 9-29; five States' briefs, No. 118, pp. 11-20; No. 332, pp. 5-13).

Introductory

The subject of this litigation is an order—one order—issued by the Interstate Commerce Commission January 12, 1953, upon complaint of the Rio Grande. The order requires the Union Pacific and over 200 other railroads to establish through routes and joint rates in connection with the Rio Grande on the commodities specified in the order which constitute approximately one-third of the total volume of traffic the Rio Grande seeks to divert to its line from the Union Pacific and other railroads. The Union Pacific and other railroads named above were first to attack the order by their complaint filed June 25, 1953, in the Nebraska court (Nebr. R. 3). The Washington Public Service Commission and other State commissions intervened as plaintiffs in that suit (Nebr. R. 97), which sought to enjoin and annul the Commission's order on the ground that it was entirely null and void. A majority of the Nebraska court filed its opinion October 22, 1954, sustaining the Commission's order in part and enjoining and annulling it in part, Circuit Judge Johnsen dissenting on the ground that the order was void and should be enjoined and annulled in its entirety (Nebr. R. 151-179).

The Rio Grande filed suit in the Colorado court October 22, 1953, seeking to enjoin and annul the Commission's *failure* to issue a different and more comprehensive order which would include all commodities instead of those specified in the order actually issued (Colo. R. 1). The Colorado court filed an opinion January 13, 1955 (Colo. R. 279), sustaining the Rio Grande contentions, but upon consideration of motion for new trial and reconsideration, that opinion was modined and did not become final until the court issued its modifying order April 22, 1955 (Colo. R. 363).

The Colorado court held that the Commission had erred in holding that through routes were not already in existence via the Rio Grande for the traffic it sought moving from and to the northwest area in the States of Oregon, Washington, Montana and Idaho, and that this holding by the Commission "prejudiced the entire proceeding." That court remanded the case for further proceedings by the Commission in conformity with the court's opinion and judgment (Colo. R. 361-362). Notwithstanding its holding that the Commission's view that through routes were not in existence via the Rio Grande had "prejudiced the entire proceeding," the Colorado court did not annul or disturb the order actually issued by the Commission granting through routes and joint rates via the Rio Grande for about a third of the traffic, but instead merely enjoined and annulled the Commission's action "insofar as it denied and withheld relief" to the Rio Grande. In other words, the Colorado court purported to enjoin and annul the Commission's *failure* to issue an order, or to make the order actually issued, more favorable to the Rio Grande by including more commodities and traffic than the Commission included in the order it issued.

Although the suit of the railroads and the five States in the Nebraska court sought, as their appeals seek in this Court, to annul and enjoin the order issued by the Commission in its entirety on the ground that it is wholly null and void, and a decision accordingly by this Court on the issues in the appeals from the Nebraska court would necessarily dispose of the whole litigation, the briefs of both the Government and the Rio Grande present as the first question for consideration by this Court whether the Colorado court erred in holding that the Commission was wrong in its finding that through routes and joint rates

were not in existence via the Rio Grande for the involved traffic. This, the Government's brief states at page 57, "was a premise of the Commission's order" and is considered first in the Government's brief. The Rio Grande's brief at page 53 argues that the question whether through routes already existed via the Rio Grande "was from the beginning and is now the first and basic issue in this litigation." That question was not raised or decided in the Nebraska court, since the attack there was upon the Commission's order as issued and not, as in the Colorado court, upon the Commission's *failure* to issue some other and different order upon a different legal or factual premise or basis than that which it adopted as the basis for the order issued.

The Rio Grande's purpose in contending that the "first and basic issue" is whether the Commission erred in holding that through routes were not already in existence via the Rio Grande is, of course, an endeavor on its part to have this Court adopt the theory of the Colorado court and remand the proceedings to the Commission on the assumption that the Commission will feel compelled to issue an order more favorable to the Rio Grande than the order it actually issued.

The Rio Grande's brief asserts at page 36 that the suit in the Nebraska court dealt only with "that part of the Commission's order which granted affirmative relief to the Rio Grande," while the suit in the Colorado court dealt only with "that part" of the order which "denied and withheld" relief to the Rio Grande. This is an erroneous and untenable view of the Commission's order. The Commission issued only *one* order which is reproduced verbatim as Appendix A to this brief. As will be seen from its language, the order is entirely affirmative. It directs the carriers to do what the Commission intends

them to do, and it does nothing else. It is *not* in *two* parts. It contains no "part" which denies or withholds anything from the Rio Grande. There is no order embracing the matter of which the Rio Grande complained in the Colorado court and hence, no basis for judicial review of the subject matter of the Rio Grande's complaint to that court, namely, the Commission's *failure* to make an order which it did not make.

Since the only order issued by the Commission is the order requiring through routes and joint rates (App. A, hereto) which we contended in the Nebraska case, and contend here, to be entirely null and void, we respectfully submit that the appeals from the decision of the Nebraska court should be first presented to and considered by this Court, particularly since a decision agreeing with any of the contentions made in the attack upon the order issued would dispose of the entire litigation, making it unnecessary for this Court to give any consideration to the decision of the Colorado court.

However, if the Colorado case is considered first by this Court, then the first question, as shown in the brief of the five States (No. 332) and of the railroads (No. 333) in the Colorado case, is whether the court erred in failing to dismiss the complaint on the ground that there was no order embracing the matter of which the Rio Grande complained, and the second question for consideration is whether the Colorado court erred in denying the motion to dismiss on the ground that the Rio Grande had no legal right or standing to maintain its suit. Until and unless these questions have been considered and decided in the negative, this Court would have no occasion to reach the question whether the Colorado court was correct in holding that through routes were already in existence

via the Rio Grande for the involved traffic. That question, we submit, however, became moot and is of no legal significance, since the Commission, though finding that through routes did not exist via the Rio Grande, proceeded unhampered by the short-haul prohibition of Section 15(4) to order through routes and joint rates for all commodities which the Commission thought the "public interest" required under the evidence before it.

In this reply brief we shall discuss the Nebraska decision before taking up the Colorado decision.

The Nebraska Decision

The Nebraska Court did not err in holding that the evidence did not support the order as to shipments not requiring stoppage for transit operations at points on the Rio Grande.

The Government's brief, page 75, contends that the Nebraska court "erroneously narrowed the scope of relief granted by the Commission's order." The Rio Grande asserts that the Nebraska court erroneously usurped administrative power and substituted its judgment for that of the Commission, and for that reason the court's judgment should be reversed (brief, pp. 87, 115).

We agree that, insofar as it sustained the Commission's order, the Nebraska court not only usurped administrative powers but also substituted its own standard or basis for the order for that invoked by the Commission. For these reasons and others, we contend that to the extent it sustained the Commission's order, the Nebraska court's decision is erroneous and should be reversed (see railroad brief, No. 118, p. 42, *et seq.*).

We do not agree, however, that the Nebraska court usurped administrative power in annulling and enjoining the Commission's order insofar as it embraces shipments that would not require stoppage-in-transit for processing, storage or other commercial operations at points on the Rio Grande and later shipment beyond its termini: That court's action in this respect was based not upon a "weighing" of the evidence by the court to determine what conclusions should be drawn from it, but upon the court's finding of fact "I" and its conclusion of law that "the evidence does not justify" the Commission's finding that services via Union Pacific routes are inadequate and, hence, does not support a finding that the Rio Grande route is necessary for shipments that do not require transit operations at points on the Rio Grande (Nebr., R. 165, 168). Whether an order is supported by substantial evidence is and always has been a question of law, and the Nebraska court was clearly within its judicial power in holding that the evidence was insufficient to support the Commission's ultimate finding as to shipments not requiring transit operations at points on the Rio Grande. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91; *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 140. Moreover, the Commission had already found Union Pacific routes to be adequate, efficient, shorter, faster and with ample capacity to haul "the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" (Nebr. R. 62). Indeed, the Commission's conclusion that Union Pacific routes are "inadequate" was not based on evidence at all but upon the physical and geographical fact that they "are not available, and higher rates apply" at points on the Rio Grande, i. e., at points *not* located on Union Pacific routes (Nebr. R. 70).

The interpretation of clause "(b)" of Section 15(4) of the Act urged by the Rio Grande and the Government is untenable and would completely nullify and emasculate the short-haul prohibition of that section.

The Rio Grande's brief argues (pp. 99-101) that the Nebraska court too narrowly interpreted clause "(b)" of Section 15(4) of the Act, which permits the Commission to order an additional route which short hauls existing routes if "the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." In this connection, the Rio Grande argues that in determining whether a proposed additional route is justified under clause "(b)" no consideration should be given to the adequacy, efficiency or economic transportation service of existing routes, but that the basic question is "whether the transportation would be better for the economy of the area involved and the country as a whole" and whether, in this case, present railroad transportation service from and to the northwest area is "as adequate as it would be if through routes and competitive joint rates were in operation over the Rio Grande" and whether "a choice of routes" rather than "one route" would be better for the economy of the northwest area. The Government's brief, page 82, argues to the same ultimate effect.

In the first place, the suggestion that shippers from and to the northwest area have no "choice" of routes but have only "one route" is a fantastic distortion or misrepresentation of fact, for as shown at pages 53-55 of the railroad brief in No. 333, there are now in existence literally millions of through routes with joint rates between the 39,000 stations in the east and south and 2,900 stations in the northwest between which the involved traffic now moves and has moved for more than half a

century. In the second place, the argument that transportation is not "as adequate as it would be" if the Rio Grande route is added, or that the admitted adequacy and efficiency of existing through routes "is no bar to an order" requiring an additional route which short hauls existing routes, are but arguments that transportation service would never be adequate within the meaning of clause "(b)" until every possible through route at equal joint rates has been established via every railroad which connects with other railroads and could be included as a part of a through route between the origin and destination of a shipment. This, of course, would completely nullify and emasculate the short-haul prohibition of Section 15(4) and, indeed, the Government's and Rio Grande's entire argument on the meaning of clause "(b)" is in effect a contention that it should be so interpreted as to deprive trunk line railroads of any protection of their long hauls under the short-haul prohibition.

This Court recently held (1952) in *Thompson v. United States*, 343 U. S. 549, at page 559, that protection of a carrier's long haul is a "right guaranteed by Section 15(4)" of the Act, and warned that no such "unwarranted distortion of the statutory pattern" as the Government and the Rio Grande now urge would be tolerated by the Court. That decision shows at page 555 that this Court has found it necessary to strike down the "Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes" and discloses the Commission's repeated and continuous efforts, through construction or repeal of the short-haul prohibition, to eliminate it entirely.

The interpretation of clause "(b)" for which the Government and Rio Grande now contend is diametrically

opposed to the purpose of legislation which led to the enactment of that clause. In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Cong., 1st Session, the Senate Committee on Interstate Commerce said at page 2:

> "Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available.* * * * The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate.* If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

Surely, legislation enacted for the declared purpose of making the "shortest, quickest, and cheapest routes available" to shippers in lieu of longer, slower and costlier routes, may not be so distorted by interpretation as authorizing the Commission in this case to short haul the shorter, faster, cheaper Union Pacific routes 925 miles by ordering the addition (to the millions of presently existing routes) of the longer, slower, more onerous Rio Grande line which would result in routes from 33 to as much as 50% longer than the present Union Pacific routes (Nebr. R. 62, 70, 71). It is utterly illogical, unreasonable and fantastic to contend that where, as here, the Commission finds existing routes to be shorter, faster, more efficient, less onerous, and adequate to haul any foreseeable volume of traffic between the northwest and the eastern and southern parts of the country, the addi-

tion of the Rio Grande's more onerous, slower, mountainous route is "needed" to provide the "adequate, and more efficient or more economic, transportation" contemplated by clause "(b)" of Section 15(4), or the "adequate, economical, and efficient service" and "sound economic conditions in transportation" sought by the National Transportation Policy, or the "adequate and efficient railway transportation service" which the Commission must consider under Section 15a(2) in prescribing reasonable rates.

This Court has rejected the view that the Commission may short haul existing routes by requiring another route because existing routes do not serve the same territory served by the proposed route, or because shippers or passengers may prefer a larger "choice" of routes, holding that these are not reasons for condemning and short-hauling existing routes, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, 544-545. And see *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

The sweeping interpretation of clause "(b)", for which both the Rio Grande and the Government contend and which would emasculate the short-haul prohibition and give the Commission complete and unrestricted power to order new through routes that short haul existing routes, is, of course, induced by the Commission's own erroneous interpretation of that clause, in a continuation of its time-worn efforts to overcome and evade the impact of the short-haul prohibition. *Thompson v. United States, supra*, 555. Being unable upon the evidence in this case to condemn the Union Pacific routes as inadequate or to find any ground for condemning them under past precedents or present standards governing its action, the Commission invented a new theory or standard of transportation requirements for perishable food prod-

ucts. Its report states that these products require "as wide a distribution as possible," that growers and producers in the northwest area "need as many markets and outlets as possible," that the marketing system for food articles requires as orderly a distribution of them "as possible" and that such articles "must be moved to market * * * over as many routes as possible," without unnecessary interruptions so that there may be "as much flexibility as possible" in the distribution process (Nebr. R. 56, 70).

We have shown in our openng briefs that the Commission thus completely forsook and departed from the statutory standards requiring "reasonable through routes," Section 1(4), and "adequate, economical, and efficient service" required by the National Transportation Policy, and "adequate, and more efficient or more economic, transportation" contemplated by clause "(b)" of Section 15(4), which it avowedly invoked (railroad brief No. 118, pp. 52-113; States' brief No. 118, pp. 40-69).

The fallacious and untenable interpretation by the Commission of its authority, which the Rio Grande and Government counsel now hopelessly undertake to defend, is aptly and correctly condemned in the dissenting opinion of Circuit Judge Johnsen as follows (Nebr. R. 172-173):

> "Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to 'as many routes as possible' and 'as much flexibility as possible in the distribution process,' so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad serving as a bridge line and further such new route can be de-

> clared to provide 'more economic transportation,' because by placing joint rates in effect the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then *the railroads of the country may as well forget section 15(4) entirely as affording them any protection whatever against deprivation of their long hauls.*" (Italics added.)

The language quoted above (page 12) from the report of the Senate Committee on Interstate Commerce is enough, alone, to condemn and cause this Court to reject the Commission's misinterpretation of its authority to require through routes, and the feeble arguments of counsel for the Rio Grande and the Government to support that misinterpretation. This Court has made legislative history decisive of the construction of statutory provisions in innumerable cases (see Appendix A to dissenting opinion of Mr. Justice Frankfurter in *Comm'r v. Estate of Church*, 335 U. S. 632, 687-689, citing more than 125 "DECISIONS DURING THE PAST DECADE IN WHICH LEGISLATIVE HISTORY WAS DECISIVE OF CONSTRUCTION OF A PARTICULAR STATUTORY PROVISION").

The claimed misinterpretation by the Nebraska court of Sections 3(1), 15(3) and 15(4) of the Act.

The Government in a footnote at page 82 of its brief states that the Nebraska court erred in holding that Section 3(1) of the Act is not applicable to situations where, as in this case, persons alleged to be preferred and those alleged to be prejudiced are located on different railroads, but that the result in this case is the same whether it is analyzed in terms of Section 15(3) and (4) or "whether one looks also to Section 3(1)."

The Rio Grande, at page 102 of its brief, contends that the Nebraska court erred in interpreting and applying all of these provisions and particularly in holding that Section 3(1) is inapplicable to the facts in the instant case. The Rio Grande brief does not make clear the respects in which it claims the majority of the Nebraska court misinterpreted or misapplied any of these provisions except possibly the following holding of that court (Nebr. R. 164):

> "If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3(1) merely because a shipper entity described in Sec. 3(1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15(4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3(1)."

It is noted that the majority of the Nebraska court held that the evidence "furnishes no basis for the order under Sec. 3(1)." We have thoroughly demonstrated, we believe, that the Commission's finding of undue preference and prejudice in violation of Section 3(1) has no basis in law and is not only without support of evidence but is contrary to the overwhelming preponderance of the evidence of record. (Railroad brief No. 118, pp. 194-222; States brief, No. 118, pp. 69-92.)

If the Rio Grande's contention is that the Commission should have ignored the short-haul prohibition in Section 15(4), but should, nevertheless, have granted through routes and joint rates in the exercise of its power under Section 3(1), then its contention is wholly

untenable because there is nothing in Section 3(1) which suggests that the Commission may order through routes and joint rates to remedy undue preference and prejudice. No case can be found in which the Commission attempted to base a through route and joint rate order upon Section 3 of the Act. We think the majority of the Nebraska court erred in failing to hold that the Commission's finding under Section 3(1) is invalid because it is unsupported by evidence and for other reasons set forth in the portions of our briefs just cited.

On this point, the following views of Circuit Judge Johnsen should be adopted by this Court (Nebr. R. 178):

> "But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3(1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3(1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3(1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15(4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through

routes and joint rates in relation to the existing conditions."

All else aside, and the Commission having found that the evidence as to transportation conditions would not support a finding of discrimination against the Rio Grande under Section 3(4) (Nebr. R. 72), Circuit Judge Johnsen is correct in holding that the evidence disclosing the dissimilarities in physical and transportation conditions does not justify the Commission's finding of a violation of Section 3(1) and we have so demonstrated in our briefs at pages just cited.

In connection with its discussion of Section 3(1) and (4), the Rio Grande's brief at pages 102-103 points to the fact that the Union Pacific does maintain through routes and joint rates with the Rio Grande on traffic to and from points in California. The inapplicability of this attempted comparison is made clear by the following undisputed testimony of witness Stilling (Vol. I, 818):

> "All of the routing arrangements via junction points in southern California have been in effect for many years, and those applying in connection with the Union Pacific were established by the Los Angeles and Salt Lake Railroad when it was an independent corporation.
>
> "As stated earlier in my testimony, the Union Pacific obtained control of the LA&SL in April, 1921, and all of the joint rates and through routes established by the LA&SL have been continued in effect. Absence of control of the LA&SL by the Union Pacific until 1921, and the additional fact that *through routes with the Rio Grande via Utah junctions are in many instances materially shorter than Union Pacific long haul routes, creates a situation directly opposite to that involving traffic to and from Idaho,*

Montana, Oregon and Washington where no joint rates have been in effect via the Rio Grande's longer route for almost half a century.

"There is another important difference between the Rio Grande's participation with the Union Pacific in trans-continental traffic to and from Los Angeles and its non-participation in through routes and joint rates to and from Portland, Seattle or Spokane, and that is that the total transportation performed to a point like Chicago is substantially greater from the Northwest than from Los Angeles.

"From Los Angeles to Chicago via Union Pacific, Provo, Utah, Rio Grande, Denver and CB&Q it is 2,293 miles. From Portland via Union Pacific, Ogden, thence Rio Grande and CB&Q it is 2,473 miles or 180 miles farther than from Los Angeles via the Provo route." (Italics added.)

As stated above, there is no language in Section 3(1) or 3(4) which suggests that the Commission has power to order through routes and equal joint rates via the Rio Grande, and it is a plain distortion of the statutory pattern to contend that any such power derives from the provisions of that Section. If this were not so, then the Commission has had the through routes power since the original Section 3 was enacted in 1887, and the enactment of the limited through routes power in Section 15(3) and (4), in 1906 and later amended, was but a useless and idle gesture on the part of Congress. Moreover, since the order in this case was issued upon complaint of the Rio Grande seeking to equalize rates on traffic which it handles or hopes to handle, the proviso to Section 3(1) seems clearly to preclude any application of Section 3(1) or (4) to this case, and, further, the proviso would seem to prevent any use of Section 3 to circumvent Section 15(4) or to confuse or intermingle the provisions of those sections. The proviso reads:

> "That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Even where a shipper is placed at a competitive disadvantage with other shippers because of inadequate service, and higher rates over longer routes, and adequate and more efficient and less costly routes are needed to effect a fair "competitive relation" with other shippers, "the Commission's authority to grant relief is bottomed on §15(3) and (4)" and not upon Section 3 of the Act, *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, 590. But under those circumstances the Commission is not justified in ordering longer more onerous routes, as in this case, to short haul existing Union Pacific routes which it expressly finds to be shorter, faster and adequate to haul any foreseeable volume of the involved traffic. The three-judge district court decision, affirmed by this Court, in the case last cited, held, 54 F. Supp. 381, 392:

> "Of course, the Commission would clearly not be justified in attempting to neutralize the disadvantage of geographical location such as Stickell has, by requiring of a carrier wasteful or additional service, without adequate compensation, even though Stickell might, for competitive or other business reasons, be in dire need thereof."

The through routes required in that case eliminated four extra days' time in transit, a 149-mile out-of-line or back-haul costing the shipper 90¢ per ton, and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the Commission's order would result in at least 219 miles additional and wasteful transportation, and routes as much as 50% longer, over the most "onerous" operating conditions of any western

railroad, requiring two more interchanges, one or two days more time in transit, and would short haul existing shorter routes by at least 925 miles and deprive some of the railroads of their entire hauls.

The reference in the Rio Grande's brief (pp. 107-109) to certain routes that could be made in connection with its line that would give the Union Pacific a longer haul than it now obtains in connection with other railroads serving the northwest area affords no justification for the Rio Grande's demands, in the absence of evidence showing similarity of transportation conditions over existing routes and the proposed Rio Grande route. The Commission considered these suggestions of the Rio Grande, as its report clearly shows, but since supporting evidence was lacking, it rejected them in the following language (Nebr. R. 72):

> "As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

"*There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to.* A finding of discrimination under section 3(4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. *No such a showing has here been made.*" (Italics added.)

Testimony of public and shipper witnesses from the northwest area overwhelmingly opposed the Rio Grande and its statements with respect to that testimony are incorrect and misleading.

At page 97 of its brief, the Rio Grande states:

"Most of the shippers who testified before the Commission are located at points in northern Utah, in Idaho, in Oregon and Washington served by the Union Pacific. A summary of the testimony of various shippers and producers of the commodities involved in the order of the Commission is set forth in Appendix F attached hereto. The testimony of these shippers establishes beyond question the need for the competitive joint rates and through routes prescribed by the Commission."

Again, at page 98, its brief states:

"Under the existing rate restrictions imposed by the Union Pacific and its preferred connections, shippers in northern Utah, Idaho, Montana, Washington and Oregon do not have an opportunity of making a selection of routes enabling them more profitably to market their products, and in some cases to 'feel out' the markets at such points as Grand Junction, Pueblo, Colorado Springs and other points in Colorado and Utah served by the Rio Grande via Ogden or Salt Lake City."

The Government's brief, at page 77, states that:

"* * * growers and shippers in the excluded territory [northwest area] are deprived of access to the markets represented by processors and dealers who are served only by the Rio Grande. * * *"

It defies belief that the Rio Grande would, in the face of the record before the Court, attempt to plead and rely upon the situation of shippers in the northwest area and particularly to create the false impression that the testimony of the majority of shippers from that area expressed any need or desire for through routes in connection with the Rio Grande. The record shows exactly the reverse to be true.

Attached as Appendix B to this brief is a list, with appropriate references to the record, of all witnesses who testified before the Commission from Washington, Oregon, Montana, Idaho and Utah north of Ogden. The record shows that 14 witnesses from the State of Washington, including the Public Service Commission of that State, testified in vigorous opposition to the Rio Grande and that *not a single witness from Washington supported its complaint;* that 2 witnesses from the Board of Railroad Commissioners of Montana and 3 important shipper witnesses from that State vigorously opposed the Rio Grande's complaint and *not one witness from Montana supported it;* that the Public Utilities Commissioner of Oregon and 13 shippers of large quantities of traffic from and to that State vigorously opposed the Rio Grande and that *only 2 witnesses from Oregon supported it.*

Despite its vigorous propaganda campaign soliciting witnesses from the northwest area, the Rio Grande was able to procure only 2 witnesses from the large number who testified from the States of Washington, Oregon

and Montana, while 33 witnesses from those States vigorously opposed the Rio Grande. It succeeded in procuring witness Titus (V. 1, 213), who testified that no shipper in his organization had expressed any need for the Rio Grande route and that no one could foretell whether the route would be used until after it was established; and it succeeded in procuring witness Miller (V. I, 531), who said the strongest "argument" he could make for the Rio Grande route was to have it available at equal rates in case other lines were blocked by snow storms—a situation expressly provided for by the emergency provisions of Section 15(4) of the Act.

Even in Idaho, where the Rio Grande particularly concentrated its solicitation of supporting witnesses, it succeeded in procuring only 18 witnesses, while 37 witnesses from Idaho testified vigorously in opposition to the Rio Grande. From Utah north of Ogden only 2 witnesses supported the Rio Grande, while 3 witnesses from that locality opposed it.

To summarize, the Rio Grande was able to procure a total of only 22 witnesses out of the vast area of Utah north of Ogden, Idaho, Oregon, Washington and Montana; 2 of whom were from Oregon, 2 from Utah north of Ogden and 18 from the southeast corner of Idaho; whereas a total of 73 witnesses from that northwest area vigorously opposed the Rio Grande's complaint.

Careful examination of the record shows that some 12 Idaho producers and shippers who supported the Rio Grande ship approximately 10,000 carloads annually of fruits and vegetables and that their shipments go to all markets in the 48 States and to Canada, South Pacific, South America, Cuba, South Africa, and other points (V. 1, 246, 247), while the 37 Idaho producers and ship-

pers who testified in opposition to the Rio Grande ship and receive annually over 60,000 carloads of these products, and all of them stated that the lack of equal joint rates via the Rio Grande had never handicapped or interfered with free and widespread distribution or effective participation in the markets for their fruits and vegetables. (For more complete discussion and analysis of the testimony, both in support of and in opposition to the Rio Grande, see railroad brief, No. 118, pp. 131-181, which includes a discussion of the Rio Grande's admitted solicitation and procurement of the witnesses that supported its complaint.)

The Rio Grande's suggestion at page 97 of its brief that the testimony of witnesses summarized in Appendix F to its brief represents the "typical" attitude and alleged need of routes via the Rio Grande as expressed by shippers in the northwest area is therefore entirely false and wholly misleading. The witnesses whose testimony is summarized in Appendix F to its brief, as clearly appears from examination of the appendix, are not from the northwest area as such but from the southeast corner of Idaho and from Utah, Colorado and Kansas.

The Commission's report clearly shows that the purpose of its order is to afford "relief" to shippers in the northwest area who, the report erroneously asserts, "are debarred from effective participation" in the marketing system for perishable articles. Hence, the witnesses whose testimony is summarized in Appendix F to the Rio Grande's brief is overwhelmingly contradicted, as is the Commission's own assertion, by the testimony of *all* witnesses from the States of Washington and Montana, all but 2 witnesses from the State of Oregon, and 37 as against 18 witnesses from the State of Idaho, and 3 against 2 witnesses from Utah north of Ogden.

The Commission having designed its order for the purported benefit of shippers in the northwest area, despite the denial of the State commissions and shippers in that area that there is any need for routes via the Rio Grande or that they want any "relief" through the medium of the longer, more onerous Rio Grande routes, from the shorter, faster Union Pacific routes which serve them, the testimony of witnesses along the Rio Grande in Utah and Colorado, and other witnesses from Kansas who testified about commodities not included in the order, affords no support for the order or the position of the Rio Grande or the Government, and their counsel are not justified in an attempt to shift the basis of the order from purported "relief" to shippers in the northwest to receivers and processors of commodities generally along the Rio Grande Railroad.

The suggestion in the Rio Grande's brief that shippers in the northwest area have no "choice in the selection of routes" not only contradicts the testimony of practically all shippers from that area but also contradicts the fact discussed at page 54 of the railroads' brief in the Colorado case (No. 333), that there are literally millions of through routes with joint rates in existence and available for shippers' "choice" from and to the northwest, and none of those shippers or any other shippers have ever demanded through routes over the longer, more onerous, Rio Grande line for the involved traffic.

The Rio Grande's assertion that shippers located exclusively on the Union Pacific and other lines serving the northwest area have no "choice" of routes is also fallacious and misleading in view of the inescapable fact that no shipper served exclusively by one railroad has or could have any choice of routes until his traffic reaches

the junction of such railroad with another. In other words, every railroad, including the Rio Grande, "monopolizes" the railroad traffic of shippers located exclusively on its line, at least to the extent that the shipments can move only over the rails of the railroad serving the shipper until shipments reach the end of its line or its junction with another line. For example, the Rio Grande has a complete "monopoly" of all railroad traffic originated and terminated on its line between Provo, Utah, and Denver, Pueblo and Trinidad, Colorado, for the reason that no other railroad connects with the Rio Grande or serves the territory traversed by it between those points (see map, Appendix C, Rio Grande's brief).

The Nebraska court was correct in holding that there was no evidence to support a finding by the Commission that Union Pacific routes are inadequate, or a need for the Rio Grande route for shipments which do not require stoppage-in-transit for storage, processing or other commercial operations at points on the Rio Grande.

Both the Government and the Rio Grande argue that the Nebraska court erred in holding that there is no evidence to support a finding by the Commission that Union Pacific routes are inadequate or that there is a need for the Rio Grande route for shipments which do not require stoppage-in-transit for processing, storage, grazing cattle, or other commercial operations at points on the Rio Grande (Govt. brief, pp. 79-80; Rio Grande brief, pp. 90-93).

The Government's brief states at pages 79-80 that the Nebraska court "ignores the factor of reconsignment privileges," and that this "was a basic feature of the Commission's rationale." The Rio Grande's brief at page 98 asserts that the Nebraska court in sustaining

the order only as to shipments actually stopped for processing, storage or other transit operations at points on the Rio Grande, and enjoining it as to shipments *not* requiring such commercial operations but which might merely be "reconsigned" while moving over the Rio Grande, deprives shippers from the northwest area of an opportunity to "feel out" markets at points along the Rio Grande and, failing to sell at such markets, then to "reconsign" their shipments to points east of the Rio Grande's termini. That argument is made in the apparent view that if the through routes and joint rates are limited to shipments actually stopped for processing and other transit operations at points on the Rio Grande, the quantity of traffic it would be able to divert from Union Pacific routes would be unattractively small or at least not nearly so large as the quantity would be if there were no limitations upon the application of the joint rates via the Rio Grande.

In the first place, as already noted above, the Rio Grande's gratuitous plea for the alleged benefit of shippers from the northwest contradicts their own overwhelming testimony that they neither need nor want the longer routes via the Rio Grande, and also contradicts their testimony that in view of the sparse population of the mountainous area along the Rio Grande, there are no markets there to "feel out," and moreover that fresh fruits and vegetables, which are the principal commodities involved, are freely and plentifully grown in the area served by the Rio Grande and seek markets also in the east and south (see railroad brief, No. 18, pp. 170-171, pointing to the very small population of the points located upon and served exclusively by the Rio Grande).

The Nebraska court held (Nebr. R. 165) that:

> "The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points."

The last sentence in the court's third conclusion of law (Nebr. R. 168) holds:

> "Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking."

While we contend that the Nebraska court erred in failing to hold that the order was entirely void for lack of supporting evidence and numerous other reasons, we submit that the court was within its judicial power and was correct in holding that the evidence did not support the order to the extent indicated in its opinion.

The contention now made by the Government and the Rio Grande that "reconsignment privileges" at points along the Rio Grande "was a basic feature of the Commission's rationale" has no basis in the Commission's own report, except perhaps on the "all possible routes" theory which is plainly untenable and contrary to the stat-

utory pattern and express purpose and provisions of Sections 1(4) and 15(4) of the Act.

The "basic feature of the Commission's rationale" was not reconsignment privileges but shipments that "may be stopped in transit for various commercial operations [at points on the Rio Grande] and reshipped at the balance of the joint rate" (Nebr. R. 48). Indeed, examination of the Commission's report leaves no other conclusion than that transit operations such as processing, storing, grazing, etc., at points on the Rio Grande is the key to or basis upon which the Commission pivoted its order. The report labors painfully in an effort to prove that no matter how adequate, efficient and capable the Union Pacific routes may be, there is nevertheless a reason, namely, transit operations, for perishable traffic from the northwest to move at equal rates through points located on the longer and more onerous Rio Grande route. The following discussion in the report completely refutes the contention that "reconsignment" at points on the Rio Grande was a basic purpose of the order (Nebr. R. 48-49):

> "*Transit.*—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be *stopped in transit* for various *commercial operations* and reshipped at the balance of the joint rate from the point of origin are of great value to shipper, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.
>
> "The Rio Grande, like other railroads, offers a large number of such transit arrangements, *including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling,*

fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of which are *stopped for storage, partial unloading at a number of points, and fabrication in transit.*

"'On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the *stoppage-in-transit arrangements offered by that railroad at such Rio Grande points.*

* * * * *

"A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows." (Italics added.)

The discussion in the report of particular commodities which follows the discussion of "transit" clearly shows that the basic idea underlying the report was to permit stoppage-in-transit at points on the Rio Grande for commercial processes and operations of the sort we have emphasized in the above quotation. Indeed, it was not until the Commission reached its "general discussion and ultimate fact findings" that we find any reference to reconsignment privileges. This is found at page 70 of the record in the *Nebraska* case in the following language:

> "For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes."

From the above quotations and the discussion of commodities throughout the Commission's report, it clearly appears, we submit, that the reference to "traffic reconsigned" in the last quotation was merely an afterthought and that the Nebraska court correctly construed the Commission's report as based upon a purported need for perishable articles to be moved over the Rio Grande so that shipments could be stopped for processing, fabrication and other transit operations at points on that line. Since traffic *not* requiring stoppage for processing at points on the Rio Grande can be and is reconsigned as readily and flexibly while moving over the shorter, faster, Union Pacific routes, and as "reconsignment," unlike transit operations, does not require the shipment to be stopped at any particular point or to be taken from the custody of the carrier, there could be no evidence or any reason justifying a finding that there is necessity for such traffic to move through points on the Rio Grande instead of the Union Pacific routes. The error, we submit, of the Nebraska court was not in holding that the evidence would not support a finding that the Rio Grande route was necessary for traffic which might merely be reconsigned, but its refusal to hold that the order is entirely void for lack of supporting evidence and other reasons urged by the plaintiff railroads and five States in the Nebraska court and in this Court.

The Colorado Decision

The Government's opening brief, pages 57-74, thoroughly demonstrates the errors of the Colorado court in its holding that the Commission erroneously found that through routes in connection with the Rio Grande were not in existence for the involved traffic. The Government's brief, however, does not discuss the two questions presented in the Colorado case which must be considered before the through routes question is reached, namely, (1) whether the Commission's *failure* to compel through routes and joint rates for commodities *not* named in the order issued, is an "order" affording a jurisdictional basis for court review, and (2) whether the Colorado court erred in denying motion to dismiss the complaint on the ground that as the Rio Grande admittedly has no legal right to enhance its financial position by diverting traffic from Union Pacific routes, it is without legal right or standing to maintain its suit. Those questions are thoroughly discussed in our separate briefs in the Colorado case, Nos. 332 and 333, and they require no further discussion here, particularly since they are ignored in the Rio Grande's opening brief.

Our briefs in the Colorado case discuss still other questions which are not discussed in the Government's brief, nor mentioned in the Rio Grande's brief.

Also, bearing upon the question whether through routes for the involved traffic already exist via the Rio Grande our briefs in the Colorado case cite important evidential facts and circumstances not mentioned in the briefs of the Government and the Rio Grande. Since our briefs in that case so thoroughly comprehend and disprove all major contentions made by the Rio Grande

in its efforts to support the erroneous decision of the Colorado court, we deem it more appropriate to avoid repetition of the discussions there set forth, by earnestly requesting the Court's thorough consideration of the discussion of the several questions presented in our briefs in the Colorado case. This leaves for discussion in this reply brief only the following points in that case:

The Rio Grande was not prejudiced by the Commission's holding that through routes and joint rates for the involved traffic did not exist via the Rio Grande, and that question became and now is moot because the Commission ordered equal joint rates on all commodities it thought were required in the public interest by the evidence of record.

Implicit in the decision of the Colorado court and in the insistence of the Rio Grande that the question whether through routes already existed via its line for the involved traffic "is now the first and basic issue in this litigation" is the assumption that the Commission necessarily would have ordered joint rates via its line on all of the traffic, or at least would have issued an order far more favorable to the Rio Grande if it had not felt itself "restrained" by the short-haul prohibition of Section 15(4).

We submit that this is a false assumption which cannot be supported by anything that appears in the Commission's discussion in its report of the through routes question or elsewhere in the report. On the contrary, its report clearly shows that the Commission's finding that through routes did not exist via the Rio Grande for the involved traffic and that to establish them would require findings under clause "(b)" of Section 15(4), did not cause the Commission to limit its prescription of

joint rates to the commodities specified in the order, for the Commission undeniably ordered joint rates on all commodities which it felt were justified by the evidence in the public interest. Thus, it was a failure of evidence of "public interest" which limited the prescription of joint rates to the commodities named in the order, rather than any feeling of "restraint" by the Commission from the short-haul prohibition. The Commission, without apparent hesitation, readily made findings in purported compliance with clause "(b)" of Section 15(4) which, so far as the Commission was concerned, eliminated the obstacle of the short-haul prohibition and left it entirely free to order joint rates on all commodities which in its judgment were shown by the evidence to be required in the "public interest." Having removed the obstacle of the short-haul prohibition by findings it considered sufficient to meet the requirements of clause "(b)", the Commission had only to consider the evidence concerning the extent to which public interest required joint rates.

The fact that the Commission did not order joint rates on eastbound lumber or wheat, for example, justifies the assumption or deduction only that it considered the evidence insufficient to require joint rates on those commodities. Otherwise, it needed only to name them in the order. There is not a word in the Commission's report which justifies the assumption indulged by the Colorado court and the Rio Grande that the Commission felt itself "restrained" in the prescription of joint rates because it had found that through routes for the involved traffic were not in existence via the Rio Grande.

A finding of "public interest" is essential to the validity of an order requiring joint rates, even though through routes are already in existence, *U. S. v. Great*

Northern R. Co., 343 U. S. 562, 569, and since that finding depends upon adequacy of evidence, it necessarily follows that it was lack of evidence of public interest and not its finding that through routes were not already in existence via the Rio Grande which prevented the Commission from ordering joint rates on more commodities than those named in its order.

Since the Commission has already, upon its weighing of the evidence, prescribed joint rates on all commodities it considered to be required in the public interest, there is no basis or justification for the assumption that it would have taken a different view of or given the evidence any different weight with respect to public interest if it had found that through routes were already in existence via the Rio Grande for the involved traffic. Consequently, there is no basis or reason for the Colorado court "remanding" the case to the Commission except for the purpose of attempting to control the Commission's administrative judgment and induce it to change its previous appraisal of the evidence concerning public interest. This, of course, is beyond the court's power. (See cases cited in the railroads' brief, No. 333, pages 99-102.)

The fallacy of the contention that its finding that through routes did not already exist via the Rio Grande for the involved traffic "prejudiced the entire proceeding" and restricted the Commission's decision and order is readily demonstrable:

First, by the fact that, despite the alleged prejudice, neither the Rio Grande nor the Colorado court claims that the Commission proceeding was "prejudiced" in so far as it ordered through routes and joint rates and, indeed, the Colorado court very carefully worded its conclusions and final decree so as to prevent reconsideration

of, and thus to "save," that part of the Commission's action which is favorable to the Rio Grande as reflected in the order. This the court undertakes to accomplish regardless of its view that the "entire proceeding" and not merely the part of it that was not favorable to the Rio Grande, was prejudiced because of the claimed basic and fundamental error of the Commission in holding that through routes via the Rio Grande were not already in existence.

Second, the Chief Examiner's proposed report (which is in the record before this Court as an original, but not printed, document) also held that through routes for the involved traffic were not in existence via the Rio Grande and that "[i]n such a situation the limitations upon the Commission's power in Sections 15(3) and 15(4) apply" (Sheet 5). The Rio Grande did not exercise its right to file exceptions to that holding of the Chief Examiner nor did it claim that it was prejudiced by that holding.

The fact that neither the proceeding before the Commission nor the Rio Grande was prejudiced by such holding either by the Chief Examiner or by the Commission, and that neither felt restrained because of such holding, is demonstrated by the fact that the Chief Examiner proceeded to recommend that the Commission order through routes and joint rates in connection with the Rio Grande on *all* commodities, whereas the Commission felt that the evidence failed to prove that public interest required through routes and joint rates for commodities other than those named in the order, and so limited its requirement. In other words, it was not the holding that through routes were not in existence via the Rio Grande but the Commission's limitation of joint rates to commodities for which it thought the evidence showed public

interest required joint rates that caused the Rio Grande to claim it was prejudiced, and the Colorado court to hold, inconsistently, that the entire proceeding was prejudiced, though saving so much of the result of the prejudiced proceeding as was favorable to the Rio Grande.

That the Commission's finding that through routes were not already in existence via the Rio Grande was not the deterrent to an order more favorable to the Rio Grande is further demonstrated by Commissioner Patterson's view that the order should have included lumber and articles taking lumber rates, and by Commissioner Arpaia's separate expression holding that, although in his opinion through routes already existed via the Rio Grande for the involved traffic and that a finding under clause "(b)" of Section 15(4) was not required, he was nevertheless of opinion that under the evidence joint rates via the Rio Grande "are warranted in the public interest only on the commodities for which relief is included in the majority report" and that the Commission should interfere with railroad management by compelling joint rates "only when the reasons for doing so are clear and compelling" and then "only to the extent the public interest actually requires" (Colo. R. 110, 111).

It is clear, we submit, that there is no basis or justification for the Rio Grande's efforts to force these proceedings back upon the Commission in the hope of getting a fresh start and a more favorable order on the basis of the erroneous Colorado decision concerning the existence of through routes via the Rio Grande.

The Rio Grande's "typical shipments" Contention

The Rio Grande argues at pages 65-68 of its brief that "typical shipments are sufficient to support the ex-

istence of through routes generally." That argument is made, of course, in an effort to meet the statement in *Thompson v. United States*, 343 U. S. 549, at page 557, that "[t]hrough carriage implies the existence of a through route whatever the form of the rates charged for the through service." The discussion in the two paragraphs of the opinion (pages 557-559) immediately following the sentence just quoted, plainly shows that in using the term "through carriage" the court meant just what the words mean, *viz.*, through shipments regularly moved between the termini of the route or routes claimed to be "in existence."

The careful and accurate analysis of the evidence made in the Commission's report (Colo. R. 63-65), in the Government's brief (pages 12-18 and 68-72), in the railroads' brief in No. 333 (pages 53-82) and the States' brief in No. 332 (pages 38-66) demonstrate irrefutably the fallacy of the Rio Grande's contention that the few sporadic, accidental and "emergency" shipments it cites as moving over some 15 or 20 routes out of the millions of through routes of which it claims to be a part between the 39,000 stations in the east and 2,900 stations in the northwest area, furnish support for its "through carriage" theory, or its "typical" shipment contention. Obviously, one shipment from one eastern origin over one route via the Rio Grande to one northwest destination is neither proof that such a shipment moved over all or any others of the millions of existing routes nor "typical" of anything concerning the myriad of other routes. The few shipments in 1948 moved via the Rio Grande contrary to the "holding out" and "course of business" of the carriers that moved the 171,989 carloads over Union Pacific routes during that year. The "typical evidence" rule and cases cited at

pages 66-67 of the Rio Grande's brief are beside the point and without application to the situation involved here.

Clearly, the "through carriage" discussion in the *Thompson* case affords no basis for a contention that proof of a movement, for example, from Chicago, Ill., to Pocatello, Idaho, may be accepted as proving the existence of a through route via the Rio Grande from New York, N. Y., to Portland, Ore. (see shipments cited in Rio Grande original—not printed—Exhibit No. 1), for, in that case, the Court expressly held at page 559, that:

> "Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern."

The Rio Grande's brief asserts that the evidence shows "substantial and typical shipments" moved, but as observed in the Government' brief, pages 69-77, the evidence shows only 55 commercial shipments via the Rio Grande in 1948, while, as shown in the Commission's report (Colo. R. 76) 171,909 carloads moved over Union Pacific routes in 1948. Thus, the 55 cited shipments are not "substantial"; and, since their movement was necessarily limited to no more than 55 routes, they could not by any "stretch" of the typical evidence rule or of any imagination, be "typical" of the total movement during 1948, or of "through carriage" *not* performed via

the Rio Grande over the millions of existing routes over which no movement whatever is shown via the Rio Grande.

The Rio Grande's "burden of proof" Contention

Quarreling with the Commission's finding that the record contains no evidence upon which a finding of discrimination against the Rio Grande could be made because the evidence of record failed to show that transportation conditions over the Rio Grande "are no less favorable" than those over Union Pacific routes, the Rio Grande's brief, pages 73-81, argues at length that upon its mere assertion of discrimination against it, the "burden of proof" or "burden of going forward" fell upon the Union Pacific and other railroads comprising the existing routes to show that transportation conditions over their routes "are sufficiently dissimilar to transportation conditions via the Rio Grande routes through Ogden to excuse the treatment as not unjustly discriminatory."

There are many answers, the first of which annihilates this naive contention: The Commission can not make findings of fact without substantial evidence, for, "A finding without evidence is arbitrary and baseless." *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91. It can not make findings of fact upon the mere failure of one or the other party to discharge its "burden of proof" or the "burden of going forward."

Absent substantial evidence of record, the Commission can only find, as it did here, that there is no evidence upon which to base a finding in support of an allegation in the complaint. In other words, it is not a question whether one party or the other failed to submit evidence, but whether, in the end, the evidence of rec-

ord is sufficient to support allegations of the complaint and findings essential to the validity of the order requested. The Commission cannot make findings or enter a "judgment by default" since its function in a case like this is that of a fact-finding tribunal. Therefore, the cases cited on the "burden of proof" contention in the Rio Grande's brief, pages 73-75, have no bearing upon the Commission's inescapable conclusion that there was no evidence to justify a finding of discrimination against the Rio Grande.

Inconsistently, the Rio Grande next proceeds to argue that there is evidence in the record showing that transportation conditions over its line "are not less favorable" than conditions over Union Pacific routes. It then cites at pages 77-79, the testimony of its President, Wilson McCarthy, which, though showing that the Rio Grande has spent considerable money to improve transportation conditions over its line in the last several years, fails completely to make any comparison whatever of the present transportation conditions over that line with conditions over the Union Pacific routes.

Moreover, the Commission correctly made findings from evidence of record which clearly justified its final conclusion that "operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein." (Colo. R. 102). It had previously recited facts of record which showed the superiority and more favorable conditions over Union Pacific routes and the "less favorable conditions" over the longer and slower Rio Grande route (Colo. R. 94). In these circumstances the Commission plainly was compelled to conclude that there was no evidence showing that conditions on the Rio

Grande were "no less favorable" than conditions over Union Pacific routes.

Finding itself unable to produce any evidence which would justify short hauling the shorter, faster, more efficient, direct and adequate Union Pacific routes by diverting the traffic to the longer, slower, more onerous mountainous route of the Rio Grande merely to enhance its financial position, the Rio Grande has pursued a strategy or policy of condemning, maligning and vilifying the Union Pacific for its refusal to relinquish its "right guaranteed by Section 15(4)", *Thompson* case, *supra*, to its long haul on traffic originated and terminated on its 5,600 miles of railroad, of which 2,900 miles are expensive branch lines in the northwest area. (See map, App. A, to railroad brief in No. 118.) Although the Rio Grande argues that neither it nor any other railroad has any legal right to hold traffic to its line, its brief characterizes the Union Pacific's refusal to relinquish its long haul on traffic it originates and terminates on its lines in the northwest area as "its own principality," a "whim" (p. 47), a "monopoly" (p. 48), an "over-lordship" (p. 49), "the public is coerced" (p. 49), "[t]he restrictive and arbitrary rate policy of the Union Pacific" (p. 72), "such discriminatory and unreasonably prejudicial practices as the Union Pacific" imposes on the "vast growing and developing" (pp. 81-82) northwest area (which, incidentally, is served by 5 transcontinental railroads and several short lines, the heaviest traffic producing portion of that area being about 1,000 miles from Ogden, the Rio Grande's nearest terminal), "caprice practiced by the Union Pacific in the exercise of its monopoly" (p. 102), "the arbitrary and monopolistic attitude" of the Union Pacific, "assumes the right to discriminate" (p. 103). But such opprobrious epithets may

not be substituted for evidence nor may the Commission rely upon them to make findings and an order more favorable to the Rio Grande.

Decisions cited and relied upon by the Rio Grande are inapposite.

The principal burden of the Rio Grande's argument seems to be that wherever a basis for a finding of undue prejudice and preference in violation of Section 3(1) or discrimination in violation of Section 3(4) exists, the Commission has power to order through routes and joint rates in disregard of the limitations in Section 15(4) of the Act upon its through route powers. (Rio Grande brief, p. 71.)

The error of this contention is thoroughly demonstrated in our opening briefs in the *Nebraska* case, No. 118, railroads' brief, pp. 234-236; states' brief, pp. 93-100; and the railroads' brief in the *Colorado case*, No. 333, pp. 97-98. But, even if the contention were correct, it has no relevance or application here because the Commission disavowed any reliance upon Section 3 as authority for the order issued. It expressly stated (Nebr. R. 33):

> "* * * that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation."

Since the rule laid down by this Court is that "[t]he grounds upon which the administrative order must be judged are those upon which the record discloses that its

action was based." *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 87; 332 U. S. 194, 196, the validity of the Commission's order in this case may not be sustained on any ground other than that expressly invoked by the Commission.

The cases cited by the Rio Grande afford no support for its contention that the Commission may order either joint rates or through routes in the exercise of its powers under Section 3(1) or (4) of the Act. *Great Northern Ry. Co. v. United States*, 81 F. Supp. 921, affirmed *per curiam*, 336 U. S. 933, is cited six times in the Rio Grande's brief, but it has no bearing whatever on the instant cases. There, the Commission had previously prescribed joint rates with transit privileges on wheat and established through routes from Montana via Butte to California. See *General Mills, Inc., v. Great Northern Ry. Co.*, 269 I. C. C. 457, at page 460. The carriers granted transit privileges at points south of Butte, but the Great Northern denied them at Great Falls, Montana. The Commission found this denial to be unreasonable and unduly prejudicial to the Great Falls shipper and ordered establishment of transit privileges at that point. Since the through route and joint rates had already been established, the case is wholly inapposite.

U. S. v. Great Northern R. Co., 343 U. S. 562, is also cited several times in the Rio Grande's brief, for example at page 41. The decision in that case merely sustained an order of the Commission which prescribed joint rates and divisions thereof over through routes already in existence over the Montana Western Railroad and the Great Northern Railway. In sustaining the Commission's order, this Court expressly held at page 570 that "[t]he Com-

mission's order in this case did not establish any through route * * *." That case did not involve any diversion of traffic from one carrier to another, "the economic ramifications" of which the Court said at page 574 are quite different from a mere redistribution of revenues "between connecting carriers by determining divisions of revenues received on existing through routes." The Court further held at page 575 that Congress had amended Section 15(4) "to prohibit tinkering with through routes for the purpose of assisting a carrier to meet its financial needs." As there was no diversion of traffic from one route or carrier to another in that case, and since such diversion of traffic from Union Pacific routes to its line for the admitted purpose of improving its financial condition is the sole objective of the Rio Grande in this case, the decision in the *Great Northern* case is clearly inapposite.

New York v. United States, 331 U. S. 284, is cited at page 83 and elsewhere in the Rio Grande's brief, but that case is clearly without any bearing whatever on the instant case, for it did not involve any question concerning the establishment of through routes or joint rates, or of diverting traffic from one carrier or route to another. It involved the Commission's power under Section 3(f) and 15(1) of the Act to find and remove undue preference and prejudice as between shippers, localities and regions located in different parts of the country.

The Rio Grande cites *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, at several places in its brief, but the following language of the decision at page 143 shows that it is without any bearing upon the instant case:

> "The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through route and a joint rate of 16 cents to Paducah. *If they elect to continue* the existing through route via Cairo, the order operates merely to introduce reduced joint rates. *If they elect to discontinue* the through routes via Cairo, the order operates to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify." (Italics added.)

The last sentence of the opinion at page 145 further demonstrates the inappositeness of that decision here. It reads:

> "It is not primarily an order to remove discrimination in violation of § 3."

The decision in *Pennsylvania Co. v. United States*, 236 U. S. 351, at page 362, states that:

> "The sole question is whether the Commission exceeded its authority in requiring the Pennsylvania Company to cease and desist from what the Commission found to be a discriminatory practice."

The case did not involve establishment of joint rates, through routes, or the diversion of traffic from one route to another. It clearly has no application here.

Chicago, I. & L. Ry. v. U. S., 270 U. S. 287, cited several times in the Rio Grande's brief, involved the validity of a Commission order which, as stated at page 290:

> "* * * directed the steam railroads to remove the unjust discrimination which the Commission found

was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching."

The order did not involve establishment of through routes, joint rates or diversion of traffic and is, therefore, irrelevant here.

The Rio Grande's brief repeatedly cites *Virginian Ry. v. United States*, 272 U. S. 658. Our opening briefs in the *Colorado* case thoroughly demonstrate the irrelevance of that decision (states' brief, No. 332, pp. 58, 59; railroads' brief, No. 333, pp. 80-82). That decision did not involve establishment of joint rates, through routes or diversion of traffic from one route to another. The decision states at page 667 that the Commission "found that the combination rate was both unreasonable and discriminatory," but "[i]t did not order joint rates" but prescribed reasonable and non-discriminatory rates and ordered the carriers "to cease and desist" from collecting rates in excess of those prescribed.

Thompson v. United States, 20 F. Supp. 827 (no appeal), is cited at page 95 of the Rio Grande's brief in support of its contention that the Commission has power under Section 3 to order through routes and joint rates without regard to the short-haul prohibition of Section 15(4). But the language of that decision clearly shows it was not such a case. There, the Commission had found that certain carriers discriminated against another carrier and prescribed "alternative methods of removing the discrimination found to exist." The court rejected the contention of plaintiff carrier that the alternative order had the effect of short hauling it, saying that such

assumption "is prophetic and conjectural, and furnishes no adequate basis for injunctive relief," and that—

> "If the plaintiffs shall cancel the joint rates now in effect over circuitous long-haul routes and over noncircuitous routes which do not reserve to them their long hauls, it would seem to be within the power of the Commission, under section 1 (49 U. S. C. A. §1), to require the plaintiffs to show that the combination rates left in effect are reasonable and not otherwise unlawful, as well as to pass upon the reasonableness and lawfulness of such rates, *provided only that the Commission shall not use its power to deal with rates for the purpose of depriving the plaintiffs of their rights, under section 15(4), to their long hauls over noncircuitous routes.*" (Italics added.)

The Rio Grande's brief also cites *Baltimore & O. R. Co. v. United States*, 100 F. Supp. 1002, in support of its contention that the short-haul prohibition of Section 15(4) should be so construed as to nullify or emasculate it, but the decision stands for no such proposition. While the court expressed the view at page 1010 that the Commission would have been justified in basing its short-haul order upon Section 3(1), the court's opinion clearly shows that the order was based upon findings conforming to the clause "(b)" exceptions to the short-haul prohibition of Section 15(4). The Commission's report, 280 I. C. C. 121, expressly found at page 142 that the "proposed through routes are needed in order to provide adequate and more efficient and more economic transportation." The court held at page 1011 that these findings are "sufficient to justify short-hauling" and that the findings were adequately supported by evidence.

This Court's decision in *Thompson v. United States*, 343 U. S. 549, is cited 7 times in the Rio Grande's brief

and at pages 59-63 of its brief the Rio Grande tries desperately to distinguish the *Thompson* case from the cases at bar. We submit, however, that examination of this Court's decision in the *Thompson* case will show that it answers and rejects every principal contention urged by the Rio Grande in its efforts to justify diverting traffic from Union Pacific routes for a "bridge" haul over its line for the admitted purpose of improving its financial condition. (See railroad's brief in *Colorado* case, No. 332, pp. 53-86.)

CONCLUSION

The judgment of the Nebraska district court in Nos. 117 and 119, enjoining and annulling the Commission's order in part, should be affirmed and its judgment in No. 118, sustaining the validity of the order in part, should be reversed and the case remanded with direction to issue the injunction and relief prayed by the plaintiffs in that court.

The judgment of the Colorado district court, Nos. 332, 333 and 334, should be reversed and the case re-

manded to that court with direction to dismiss the complaint.

Respectfully submitted,

DON EASTVOLD, Attorney General of Washington,
ROBERT L. SIMPSON, Asst. Attorney General of Washington,
Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington.

C. W. FERGUSON, Attorney for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon.

JAMES B. PATTEN, Attorney for Board of Railroad Commissioners of the State of Montana, Helena, Montana.

GEORGE F. GUY, Attorney General of Wyoming,
Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming.

CLARENCE S. BECK, Attorney General of Nebraska,
BERT L. OVERCASH,
State Capitol Building, Lincoln, Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission and *Counsel of Record for Above Appellants-Appellees.*

ELMER B. COLLINS,
Counsel of Record for Union Pacific R. R. Co., et al., Appellants-Appellees,
1416 Dodge Street, Omaha, Nebraska.

F. O. STEADRY,
L. E. TORINUS,
WARREN H. PLOEGER,
ROLAND J. LEHMAN,
EUGENE S. DAVIS,
JAMES C. WILSON,
Attorneys for Above Named Appellants-Appellees.

W. R. ROUSE,
LOWELL HASTINGS,
EDWIN C. MATTHIAS,
M. L. COUNTRYMAN, JR.,
J. C. GIBSON,
JOHN L. DAVIDSON, JR.,
Of Counsel.

PROOF OF SERVICE

I, ELMER B. COLLINS, attorney for Union Pacific Railroad Company, one of the Appellants-Appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 18th day of April, 1956, I served, on behalf of all Appellants-Appellees herein, copies of the foregoing Reply Brief on the several adverse parties in Nos. 117, 118, 119, 332, 333 and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Donald E. Kelley, Esq.
United States Attorney
Post Office Building
Denver 1, Colorado

and with first-class postage prepaid to:

Harry W. Shackelford, Esq.
Acting United States Attorney
306 Post Office Building
Omaha, Nebraska

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.
Assistant General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Neil Brooks, Esq.
Assistant General Counsel
United States Department of Agriculture
Washington 25, D. C.

4. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

Frank E. Holman, Esq.
1006 Hoge Building
Seattle 4, Washington

Ernest Porter, Esq.
603 Rio Grande Building
Denver 2, Colorado

and with first-class postage prepaid to:

Harry L. Welch, Esq.
730 Farm Credit Building
206 South 19th Street
Omaha 2, Nebraska

5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who work for The Denver and Rio Grande Western R. R. Co.; National Live Stock Producers Association; Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Keppers Company,

Inc.; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc., and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp
738 Majestic Building
Denver 2, Colorado

Lee J. Quasey, Esq.
139 N. Clark Street
Chicago 2, Illinois

Alden T. Hill, Esq.
Woolworth Building
Fort Collins, Colorado

and with first-class postage prepaid to:

Ray McGrath, Esq.
First National Bank Building
Omaha, Nebraska

6. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.
Asst. Attorney General
State of Colorado
Denver, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Lowe P. Siddons, Esq.
Dennis O'Rourke, Esq.
Attorneys for Holly Sugar Corporation
Holly Sugar Building
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.
Vice President and General Counsel
The American Short Line Railroad Association
2000 Massachusetts Avenue, N. W.
Washington 6, D. C.

ELMER B. COLLINS,
Of Counsel for Appellants-Appellees Herein.

APPENDIX A

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of January, A. D. 1953.

No. 30297

Denver & Rio Grande Western Railroad Company

v.

Union Pacific Railroad Company, et al.

This proceeding being at issue upon complaint and answers on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination;

It is ordered, That the defendants named in the complaint, according as they participated in the transportation, be and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of

the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

GEORGE W. LAIRD,
Acting Secretary.

(Seal)

APPENDIX B

PUBLIC AND SHIPPER WITNESSES FROM THE NORTHWEST AREA (WASHINGTON, MONTANA, OREGON, IDAHO AND UTAH NORTH OF OGDEN) WHO TESTIFIED BEFORE THE INTERSTATE COMMERCE COMMISSION.

WITNESSES OPPOSING THE RIO GRANDE.

Washington

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Washington (Continued)

Montana

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Oregon

Record Vol. II Page

John H. Carkin, Salem, for 953
Public Utilities Commissioner of Oregon

Frank S. Clay, Portland 956
Portland Freight Traffic Assoc., affiliated with
Portland Chamber of Commerce
Port of Portland
Commissioner of Public Docks
Portland Clearing House Assoc. of Banks
Port of Vancouver, Wash.
Vancouver Chamber of Commerce
Port of Longview, Wash.

Edward Oakes, Ontario 1082
Duncan Brothers & Oakes (cattle)
Valley Wholesale & Warehouse Co.

George B. Carpenter, Ontario 1094
Moffat & Company (cattle dealers)

L. J. Roedel, Baker 1355
Oregon Lumber Company

Fred E. Lanzer, LaGrande 1357
Mt. Emily Lumber Company

Fred E. Kiddle, Island City 1358
Pioneer Flouring Mill Co.
Union Flouring Mill Company
Pacific Northwest Grain Assoc.
North Pacific Miller Assoc.
Pacific Northwest Grain Dealers Assoc.
Pacific Northwest Pea Growers Assoc.

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Oregon (Continued)

Idaho

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Idaho (Continued)

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Idaho (Continued)

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Idaho (Continued)

WITNESSES OPPOSING THE RIO GRANDE (Continued)

Utah North of Ogden

WITNESSES SUPPORTING THE RIO GRANDE

WITNESSES SUPPORTING THE RIO GRANDE (Continued)

Idaho (Continued)

WITNESSES SUPPORTING THE RIO GRANDE (Continued)

Idaho (Continued)

	Record Vol. I Page
Joe Fuller, Pocatello Livestock shipper	485
Anton Poitevin, Idaho Falls President, Idaho Potato Growers, Inc.	500
Roscoe C. Rich, Burley Livestock shipper	507
J. Cyril Lan, Soda Springs President, Idaho Farm Bureau Federation	551

Utah North of Ogden

LeRoy Snooks, North Ogden Manager, North Ogden Fruit Exchange	196
Lorenzo J. Bott, Brigham City Monument business	388

TOTAL NUMBER OF WITNESSES OPPOSING THE RIO GRANDE FROM THE NORTHWEST AREA	73
TOTAL NUMBER OF WITNESSES SUPPORTING THE RIO GRANDE FROM THE NORTHWEST AREA	22